

Exception Report – Filed re TAP-R proceedings – June 4, 2024

Michael Skiendzielewski, PWD consumer, WRB participant and Philadelphia citizen

This Participant urges the rate board to set aside the settlement agreement as it does not comply with best practices or the legal requirements of the hearing examiner, Philadelphia Water Department (PWD) and Philadelphia Water and Sewer Rate Board (Rate Board)

This will focus on, in addition to other issues, three main concerns:

(1) the principle, application and integration (or lack thereof) of City Solicitor’s “best practices” directive into the WRB hearings, including this current TAP-R one, since the enactment of the Water Rate Board regulations several years ago.

(2) the principle, application and consequences of “past practices” as illustrated by the professional conduct and decision-making of WRB counsel relative to his legal counsel in this proceeding as well as other PWD related services provided by the city for which he is senior counsel (e.g., the Tax Review Board)

(3) Given the facts, evidence and public record already provided in prior hearings as well as additional details submitted in this exception, the members of the Water Rate Board are faced with and responsible for deciding the following important First Amendment consideration.

Issue to be decided:

Is it appropriate, reasonable and legal for a government official to affirm that he, WRB Counsel, Daniel Cantu-Hertzler, has a constitutional right to stop this citizen or anyone else from petitioning the government?

The Memorandum below outlines the practices PWD, the Rate Board and the hearing examiner must use in regulating and operating the Philadelphia Water Department:

MEMORANDUM

TO: Bernie Brunwasser, Chairman, Water, Sewer and Storm Water Rate Board

FROM: Sozi Pedro Tulante, City Solicitor /S/

DATE: June 6, 2016

SUBJECT: Rate Board's Authority over IWRAP Design and Delinquency Collection

You have asked for advice on several issues concerning the authority of the Water, Sewer and Storm Water Rate Board, established pursuant to Philadelphia Home Rule Charter § 5-801 and Philadelphia Code § 13-101(3) (the "Rate Board"). The current Rate Proceeding is the first to be conducted since the ordinance establishing the Rate Board was enacted. This will confirm and elaborate on informal advice conveyed to you on May 26, 2016.

Included in Mr. Tulante's correspondence (opening paragraph above) is the following statement relative to issues, concerns, practices, etc. in management and administration that the WRB must also consider.

Within those parameters, the Rate Board must also consider "peer utility practices, best management practices and projected impacts on customer rates," id.; must develop rates and charges "in accordance with sound utility rate making practices and consistent with the current industry standards,"

This directive is of significant concern, particularly "best practices", as the WRB public records reflect that the long-standing WRB Counsel, Daniel Cantu-Hertzler, as supervisor of PWD/TRB hearings, approved a discounted PWD HELP loan in the amount of \$5500 and subsequent to that unjustified and undocumented decision, was WRB counsel which turned down this consumer's request for PWD HELP loan records in several WRB hearings.

Is this evidence of a "best practice" where counsel to the WRB has previously discounted a PWD HELP loan and then assisted in the denial of my request for PWD HELP loan records. Given his professional conduct and decision-making, one would think that this Integrity Award winner 2015 would be eager to display evidence, facts and records of his integrity-based professional conduct so as to compare when this same WRB counsel denied my request for similar consideration and disposition. To develop a strong sense of integrity in your decision-making, you need to be transparent and accountable for your decisions, both to yourself and to others.

".....The City's correspondence with you is over, as are any and all City investigations at your behest....."

This edict and injunction was issued by WRB counsel to this citizen in May 2018 and this directive is unethical and unconstitutional in that it violates the civil and First Amendment rights of this citizen, re access and redress to government services and officials. The intent and purpose of this pronouncement is so offensive that two of our US Supreme Court Justices, in separate cases, have issued opinions calling out the unconstitutional nature of government officials acting in such a fashion against citizens who question their actions and decisions.

Years ago, in a case where a citizen was appealing a tax issue in Kansas City, US Supreme Court Justice Gorsuch stated:

“.....When public officials feel free to wield the powers of their office as weapons against those who question their decisions, they do damage not merely to the citizen in their sights, but also to the First Amendment liberties.....”

And just last week, in a US Supreme Court case involving the NRA, US Supreme Court Justice Sotomayor issued the following ruling:

“.....Ultimately, the critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech,” Sotomayor added.....”
Supreme Court decision 5/30/2024

Clearly, WRB counsel’s reckless injunction issued to this citizen and retired Philadelphia Police Captain in May 2018 is unprofessional, improper and unconstitutional in light of the opinions issued by Justices Gorsuch and Sotomayor. Ironically, during my career, I was detailed as a lieutenant to the Civil Affairs Unit of the PPD where I was responsible for ensuring that the civil rights of demonstrators and citizens in various public meetings were protected and guaranteed as well as providing a safe environment for public protest guaranteed under the First Amendment. Apparently, WRB counsel, and the City of Philadelphia inaugural winner of the Integrity Award by the Office of the Inspector General does not believe nor will protect in a similar manner this citizen’s right guaranteed under the First Amendment ***“ to petition the government for a redress of grievances.”***

As demonstrated in this motion, WRB counsel has deemed legal and appropriate to block my access to government “for a redress of grievances.” Over the past few years, I have filed several allegations of unethical and unprofessional conduct and decision making with a number of city departments and officials responsible for ethics/integrity monitoring, review and investigation within city government. The Chief Integrity Officer, the Office of the Inspector General and several Integrity Officers in particular departments involved in the allegation have all received correspondence and allegations, both under the previous city administration as well as the current city administration. At no time, did I receive a single response to the fact-based, genuine and important allegation of impropriety from any of the senior city officials receiving my correspondence. Regarding the WRB counsel, the allegations included his May 2018 injunction violating my civil rights as well as another serious unprofessional and unresolved matter that WRB counsel was directly responsible for. Regarding his responsibility for providing counsel to the management of the Tax Review Board as well

as his duty to ensure proper notification of the elements of the process to petitioners before the TRB, in that capacity, counsel failed over a span of several years to notify petitioners of the opportunity of a second appeal under Article 15 of the TRB regulations (which ironically are 4 pages in length) and which failure and misconduct certainly would have adversely impacted financially a certain number of petitioners. WRB counsel stated that none of the petitioners he failed to ensure were properly informed of their right to a second appeal were adversely impacted and no steps would be taken by his office to address this significant oversight and professional failure.

Note to the WRB and Hearing Officer – in the world of “best practices” in professional investigations, a report compiled and submitted by the “target” of the allegation, in this case, the WRB counsel, is to be rejected immediately, logically and objectively.

Allegation of unethical and unprofessional conduct in this TRB matter was reported to the city agencies responsible for such matters but no response was received.

Even during the course of a prior WRB hearing, I filed a motion regarding WRB counsel’s injunction re my civil rights for the basis of recusal of WRB counsel and such motion was rejected, even on appeal. The basis of the rejection used in the WRB hearings was WRB counsel’s own correspondence, 4 pages, which did not address the allegations of unethical conduct in the WRB motion, but rather presented a chronology of the interactions, discussions and correspondence between this participant and counsel over an extended period of time. If there ever was a particular issue that needed the review and study provided by “best practices”, it was this particular issue in the WRB hearing. Additionally, WRB counsel, when I suggested I was considering pursuing public leafleting and protest in my advocacy, said that my consideration was “threatening” in nature. Of course, this is not the case and would have been something WRB counsel learned in the first year of law school.

Given these details and other evidence, records and correspondence between this participant and WRB, I am concerned in administrative matters where WRB counsel is involved in providing legal guidance and direction in matters that I have raised and which decisions directly impact the serious ethics and professional concerns I have raised. Since I do not know to what extent, if any, WRB counsel, in his capacity as a senior deputy city solicitor, via his First Amendment injunction re this citizen, may have been involved in the silence and lack of response from such departments as CIO and the IG, I am gravely concerned as to what impact or consequences may flow from WRB counsel’s advice and guidance to professionals on the Water Rate Board as well as the Hearing Officer who conducts the proceedings and issues the final report. It is important to point out a key phrase in the injunction issued by WRB counsel in May 2018:

“.....The City’s correspondence with you is over, as are any and all City investigations at your behest.....”

“any and all city investigations at your behest”.....how is anyone to know or discover how far and complete such a sealing off of my seeking redress of grievances is relative to the departments and forums, including the WRB process and hearings, where I raise ethics/integrity fact-based allegations.

This is the reason that I have reached out most recently to WRB and Hearing Officer to attempt to discern if in fact, WRB counsel has advised either of these groups regarding evidence-based particular allegations, motions, appeals, recusal requests, etc. that I have brought before the WRB. I have received no response from such an important and serious inquiry so as of now, I only have WRB counsel’ statement to rely on and base my judgment on in that “any and all city investigations at your behest” are over, as well as “the city’s correspondence”.

Regarding the City Solicitor’s ruling that “best practices” are issues and subject matter for consideration in WRB hearings and motions, I want to submit that the information, correspondence, evidence, records, etc. I have submitted over the course of my WRB participation regarding PWD management operations in PWD excavation represents a classic case and necessary application of the “best practices” mandate in the identification, investigation, review, protocol, operations and safety in the PWD operations and senior management decision-making at my residence years ago, under the direct management, oversight and direction of Deputy Comm. McCarty and Commissioner McCarty. A process that spanned more than two years outside of my residence reflects a improperly examination, diagnosis and identification of ALL relevant factors and failures that were evident at the same time my long laterals were identified as defective. Over the course of that time, and even beyond, I had shared with Commissioner McCarty the unremitting sinking, depression and caving-in of my grassy footway near the street by my residence. I was responsible for the long lateral repairs and even after that was accomplished, a PWD representative at the TRB hearing related, on the record, that there was a crack in my sewer inlet wall. Finally, after repeated emails and correspondence to Commission McCarty, a new diagnostic operation and review of the area was conducted which led to the identification of failed sewer inlet laterals, which were/are the responsibility of the Philadelphia Water Department. To complete the final step of PWD’s “best practices” in the area of street investigation, diagnostics and repair, PWD conducted an excavation to repair their failed sewer inlet laterals which involved the unsafe, dangerous use of heavy equipment by PWD personnel, which excavation, its pictures and evidence was shared with certified civil engineers and a professional “near-miss” management agency in Center City which all concluded that the use of the equipment violated current industry

standards and was a violation of professional protocol, putting the equipment operators and passersby at risk for injury. Despite the offer to share these facts, evidence and photos with PWD which would corroborate the unsafe/dangerous assessment of the operation, no PWD officials or management ever responded to my offer to share these materials or was there ever any certification or professional documentation shared by the city to dispute the professional findings of unsafe operation. Given the City of Philadelphia's history of failing to act expeditiously and professionally to warnings provided to city officials and management regarding dangerous conditions in operations at public locations, e.g., the Pier Collapse 2000 and the Salvation Army Collapse in 2013, it is of no surprise that there was no steps taken or response provided to address the evidence and records offered by this citizen. In a public hearing where I presented an OSHA fatality report which documented a similar utility incident with the improper use of equipment, in the later part of the meeting, without evidence, certification or documentation, Commission McCarty refuted this claim and no further action, to my knowledge, was ever taken. However, my correspondence with Peter Vaira, former US Attorney, Chairman of the Advisory Board set up by Mayor Nutter to review the Salvation Army collapse, he told me that he was not surprised by my experience and findings with the city response since the city failed to act on the recommendation to distinctly separate the safety review/monitoring function from the certification function in the city's Dept. of Licenses and Inspection. If such work described above outside my residence over a two year span represents the PWD's "best practices" in identification, review, planning and excavation at consumers' residences, then next time I submit a motion for such documents, procedures and documentation, it would be best for the WRB to adhere to and follow City Tulante's directive re "best practices".

The hearing examiner by censoring a participant's public input testimony, did not follow best practices. Her decision not to allow for review of best practices is a clear violation of the City Solicitor's finding and order; and the hearing examiner allowing PWD to collect for enrolling families in the TAP program when it did not have the regulatory right to do so, without the family's affirmative consent also fails to meet the standard of best practices.

Unless and until there is another finding from a City Solicitor stating PWD and the Rate Board does not have to practice best practices, the existing finding rules all PWD activities and proceedings. Because the hearing examiner, rate board and its support staff, have failed to follow the best practices, the settlement must be set aside and any rate increase (or rate adjustment for those who don't want to admit that adjusting rates upwards is a rate increase) sought in this proceeding.